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To: John Cooney
Office of Management and Budget

[redacted] STAT
Central Intelligence Agency

Mike Matheson
State Department

Paul Stevens
National Security Council

From: John McGinnis
Department of Justice

Attached is a draft letter, concerning H.R. 1013. The Department of Justice intends to send this letter to Representative Matthew McHugh before the hearing on this bill, which we understand to be scheduled for April 27. Please provide your comments on the letter to me by noon on Thursday, April 23.

DRAFT

Representative Matthew F. McHugh
Chairman, Subcommittee on Legislation of
the House Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1013, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice opposes enactment of this legislation because we believe it would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States. If H.R. 1013 were to pass both Houses of Congress, the Department of Justice would be constrained to recommend to the President that he disapprove the bill.

H.R. 1013 would make substantial revisons of both the congressional reporting requirements of the National Security Act and the Hughes-Ryan Amendment. Section 3 of H.R. 1013 would delete from section 501(a) of the National Security Act the present acknowledgment that the Act imposes reporting requirements on the President only insofar as the requirements are consistent with his authorities and duties under the United

States Constitution.[1] It would also delete from the Act its most crucial acknowledgment of the President's constitutional authority, namely section 501(b) which provides for presidential discretion in deferring notice to Congress concerning exceptionally sensitive intelligence activities.[2] In place of the

[1] Section 501(a) presently provides (emphasis added):

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
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> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

[2] Section 501(b) currently provides (emphasis added):

> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for

current Act's provision for the President to provide "timely notice" in such sensitive situations, section 3 of H.R. 1013 would require such notice to be given within 48 hours after the initiation of such operations.

Section 2 of H.R. 1013 goes even further with respect to operations involving the Central Intelligence Agency. It would require that copies of Hughes-Ryan "findings" be provided to Congress as well as to certain executive branch officials before the initiation of any operation requiring such findings.[3] While it is unclear whether draftsmen of the bill intended the 48-hour provision of the National Security Act to extend by implication to the Hughes-Ryan Amendment, if it does not, the CIA would be subject to an even stricter congressional notification require-

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[2] Cont.

> obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

[3] The Hughes-Ryan amendment, 22 U.S.C. 2422, provides in its present form:

> No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of title 50 [i.e. section 501 of the National Security Act].

ment than that applicable to other intelligence agencies.[4]

The Department believes that these provisions of H.R. 1013 are unconstitutional. As you know, these same issues were the subject of thorough debate and extensive negotiation in 1980, when Congress was considering proposals for intelligence oversight legislation. It was the position of the Carter Administration then, as it is of this Administration now, that there may be exceptional occasions on which the President's exclusive and inalienable constitutional duties in the area of foreign affairs would preclude him from giving Congress prior notice of very sensitive intelligence-related operations.

The Carter Administration, like this Administration, was anxious to work with Congress in devising arrangements to satisfy the Congress' legitimate interests in legislative oversight, and was even willing, in the spirit of accomodation, to agree to an extraordinary and novel form of ongoing congressional access to the plans and intentions of our nation's most sensitive and secret agencies.

But the Carter Administration recognized that there is a point beyond which the Constitution simply would not allow it to go in encumbering the President's ability to initiate, direct, and control the sensitive national security activities at issue here. Testifying before the Senate Select Committee in 1980, Admiral Stansfield Turner emphatically pointed out that the prior notification then being considered "would amount to excessive

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[4] Section 2 of H.R. 1013 also requires that the national security finding be in writing.

intrusion by the Congress into the President's exercise of his powers under the Constitution." See National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong., 2d Sess. 17 (1980). In the very nature of covert intelligence activities abroad, anyone who knows about them before they are completed has the power to force them to be cancelled simply by disclosing them (or even threatening explicitly or implicitly to disclose them). Thus, a legal right to be notified of such operations before they are completed confers on the holder of that right an effective veto power over those activities.

The Constitution confers on the President the authority and duty to conduct the foreign relations of the United States. Covert intelligence-related operations in foreign countries are among the most sensitive and vital aspects of this duty, and they lie at the very core of the President's Article II responsibilities. In this necessarily brief letter the Department will not seek to detail all the authorities and precedents relevant to our conclusion that an absolute prior notice requirement of the kind proposed in H.R. 1013 would be unconstitutional. In summary, however, the Department believes that the clear intent of the Framers, which has been confirmed by long historical practice and by clear statements of the United States Supreme Court, was to leave the conduct of foreign relations, including the conduct of foreign intelligence operations, in the hands of the President except insofar as the Constitution gives Congress specific roles to play.

The principal textual source for the President's wide and inherent discretion to act for the nation in foreign affairs is section 1 of article II of the Constitution: "The executive Power shall be vested in a President of the United States of America."[5] The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate." See The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961).

[5] The Constitution also makes the President Commander in Chief of the armed forces (Art. II, sec. 2); gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate (Art. II, sec. 2), and to receive ambassadors and other public ministers (Art. II, sec. 3); the Constitution also requires that the President "take Care that the Laws be faithfully executed" (Art. II, sec. 3). These specific

This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" explains why the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens. As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of the "executive Power."

The authority of the President to conduct foreign relations was asserted at the outset by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain impartial in the war between France and Great Britain. Similarly, the First Congress itself acknowledged the breadth of the executive power in foreign affairs when it established what is now the Department of State. In creating this executive department, Congress directed the department's head (i.e., the person now titled the Secretary of State) to carry out certain specific tasks when entrusted to him by the President, as well as "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department."

The Supreme Court, too, has recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright

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5 Cont. grants of authority supplement, and to some extent clarify, the discretion given to the President by the Executive Power Clause.

Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. at 319-320 (emphasis added). Moreover, as the Court noted with obvious approval, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history, stating that the "the President is the constitutional representative of the United States with regard to foreign nations." The Committee also noted "that [the President's constitutional] responsibility is the surest pledge for the faithful discharge of his duty" and the Committee believed that "interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety." 299 U.S. at 319 (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extraterritorial foreign policy initiatives, including intelligence activities -- an authority that derives from the Constitution, not from the consent of the legislature.

Of course, despite this wide-ranging authority, the President will in virtually every case consult with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court's Curtiss-Wright decision itself notes the President's exclusive power to negotiate on behalf of the United States. The Supreme Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).

Such statements by the Supreme Court reflect an understanding of the President's function that is firmly rooted in the nature of his office as it was understood at the time the Constitution was adopted. Indeed in the Federalist Papers John Jay specifically observed that intelligence operations in particular must be implemented with such "secrecy" and "dispatch" that their execution should be wholly entrusted to the President rather than to Congress. See The Federalist No. 64, at 392-393 (J. Jay) (C. Rossiter ed. 1961).

Nor does any provision of the Constitution affirmatively authorize Congress to take the kind of role provided for it in H.R. 1013. Congress' implied power of overseeing the activities of Executive Branch agencies is grounded on Congress' need for information to draft and consider appropriate legislation. In order to fashion legislative solutions to some problem faced by the nation, it is sufficient for Congress to receive information about intelligence activities after they are completd. Oversight of ongoing operations, however, could in some cases interfere with duties imposed on the President by the Constitution. That is why the President absolutely must retain a modicum of legal discretion in the provision of prior notice, even as he recognizes the desirablity of seeking counsel -- and, thus, providing notice -- whenever possible. Since the current legislation was adopted in 1980, of course, the President has provided prior notice in virtually every single case.

The Department of Justice also objects to Section 2 of the bill, which would require the President to furnish copies of his

national security findings to the Vice President, the Secretary of State, the Secretary of Defense, and the Director of Central Intelligence before the initiation of any operation requiring a Hughes-Ryan finding. Like the congressional prior notice requirements, though for somewhat different reasons, this provision infringes on the President's constitutional authority. By requiring certain of the President's subordinates to be notified of covert actions before they occur, this proposal is inconsistent with the President's prerogatives as head of a unitary executive to exercise full discretion in consulting and communicating with his subordinates.

The Constitution places the whole executive power in the hands of the President. In contrast to political systems that employ some form of cabinet government, our Constitution is based on the principle of the unitary executive. It is worth emphasizing that the Framers deliberately chose this principle and deliberately rejected the cabinet (or privy council) alternative, with which they were quite familiar from British practice and from the constitutions of most of the original states. Indeed Article II, section 2, of the Constitution provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." Plainly it is the President, not his subordinates and not the Congress, who decides when he requires the advice of others in the Executive Branch.

The Framers' two main reasons for choosing to create a unitary executive were complementary and mutually reinforcing. First, they thought that for the executive branch, in sharp contrast to the legislative branch, rapid and decisive decision-making is sufficiently important that it outweighs the inevitably concomitant danger that rash or ill-considered actions will be undertaken. See The Federalist No. 70, at 423-24. Second, the Framers believed that unity in the executive would promote what today we call "accountability." As Alexander Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid the blame for bad actions taken or for desirable actions left undone. See The Federalist No. 70, at 427.[6] Certainly, it would be unwise, as well as unconstitutional, to move our governmental institutions in a direction that could lead to less presidential accountability.

Of course, we acknowledege that consultation with the members of the National Security Council would almost always be a prudent presidential policy. We object only to undertaking to make such consultation a legal obligation. As a constitutional matter, there is no difference between the subordinate officials listed in this bill and thousands of other executive branch officers. If one statute could require the President to notify any of them of his national security findings prior to initiating a covert operation, another statute could just as easily require

[6] The Framers also believed that placing the whole of the executive power in one man was usefully "conducive" to secrecy -- a consideration directly relevant to H.R. 1013. See The

him to notify other subordinates, or all of them. The absurdity of such hypotheticals are such that the mind recoils, but in principle they are indistinguishable from the bill before us. Thus, given the framers' decision to create a unitary executive, the cabinet notification requirements in section 2 of this bill, like the congressional notification requirements discussed earlier, are inconsistent with Article II of the Constitution.[7]

Finally, the Department of Justice notes that when proposals similar to those in H.R. 1013 were introduced in 1979 and 1980, it was recognized that President Carter, as a temporary occupant of the Office of President, had neither the right nor the power to alter the Constitution's allocation of powers among the institutions of our government. This Administration is in the same position.

The Office of Management and Budget has advised this Department that the submission of this report is in accord with the Administration's program.

Sincerely,

John R. Bolton
Assistant Attorney General

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[6] Cont. Federalist No. 70, at 424.

[7] The requirement in section 2 of H.R. 1013, that the national security finding mandated by the Hughes-Ryan Amendment be in writing also raises questions insofar as it has some potential to interfere with the President's discretion in choosing how to run his own office. On the other hand, because this provision does serve the legitimate purpose of facilitating after-the-fact congressional oversight, it is the least objectionable feature of H.R. 1013.